UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA vs. HITHAM ABUHOURAN	CRIMINAL ACTION No. 95-560

MEMORANDUM

June 26, 2006

In 1997, defendant Hitham Abuhouran (a/k/a Steve Houran) pled guilty to twenty-seven counts of financial crime enterprise, bank fraud, money laundering, interstate transportation of stolen property, perjury and false statements to a bank, forfeiture, and conspiracy to commit money laundering and to transport stolen property in interstate commerce. He was sentenced to a term of imprisonment of 188 months, a term of supervised release of five years, a special assessment of $1350, restitution of $6,917,246.10, and an order of forfeiture.

Since November 2005, Mr. Abuhouran, acting *pro se*, has filed several motions. For the reasons discussed herein, these motions will be denied, or alternatively dismissed as moot.

I.

Mr. Abuhouran timely appealed his sentence. The Third Circuit Court of Appeals rejected Mr. Abuhouran's arguments and affirmed his sentence. *United States v. Abuhouran*, 161 F.3d 206 (3d Cir. 1998), *cert. denied*, 526 U.S. 1077 (1999).

In February 2000, Mr. Abuhouran filed a timely petition under 28 U.S.C. § 2255, arguing that the charges for money laundering were improper and asserting ineffective assistance of counsel. In August 2000, Mr. Abuhouran filed a separate motion to dismiss count twenty-seven of the indictment—one of the money laundering charges—on other grounds.[1]

In December 2000, Mr. Abuhouran filed a motion to supplement his § 2255 petition, asserting that his sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In an order dated December 28, 2000, this court granted Mr. Abuhouran's motion for leave to supplement his petition with regard to *Apprendi* but rejected his arguments on the merits.

In May 2001, Mr. Abuhouran again sought to supplement his § 2255 petition to allege that the grand jury was impaneled for an excessive period in violation of the Federal Rules of Criminal Procedure.

On November 26, 2002, this court denied Mr. Abuhouran relief under § 2255, denied his August 2000 motion to dismiss count twenty-seven of the indictment, and

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[1] Mr. Abuhouran refers to this as a "supplemental motion to dismiss Count 27 of the indictment and/or motion to vacate sentence pursuant to Rule 12(b)(6) of the Federal Rules of Criminal Procedure."

denied his May 2001 request to amend his § 2255 petition.[2] In reaching this decision, Mr. Abuhouran's motion to dismiss count twenty-seven was treated as an effort to amend his § 2255 petition. The motion was then deemed time-barred because Mr. Abuhouran sought to amend the petition more than one year after his conviction became final. The opinion also noted that the underlying issue had been addressed on the merits in *United States v. Abuhouran*, No. Crim. A. 95-560-04, 2001 WL 880323 (E.D. Pa. June 7, 2001).

In 2004, Mr. Abuhouran filed two motions to modify or correct his term of imprisonment under 18 U.S.C. § 3582(c)(2). These motions challenging his sentence under Amendments 566 and 591 to the Sentencing Guidelines were denied by this court on August 9, 2004.

Most recently, Mr. Abuhouran has filed several *pro se* motions. In November 2005, he filed a motion for relief from judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure, and he moved for appointment of counsel pursuant to 18 U.S.C. § 3006A(a)(2)(B). In December 2005, Mr. Abuhouran filed a motion pursuant to Rule 38(b) of the Federal Rules of Criminal Procedure asking this court to recommend that he be confined near the place of trial or appeal. Finally, in January 2006, Mr. Abuhouran filed a petition to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255.

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[2] An additional motion to correct his judgment filed pursuant to Rule 36 of the Federal Rules of Criminal Procedure was also denied in December 2002.

II.

Mr. Abuhouran's motion for relief from judgment under Rule 60(b)(6) seeks to challenge this court's November 26, 2002 denial of his motion to dismiss count twenty-seven of the indictment. He argues that the claim was erroneously construed as time-barred and reopening of the judgment under Rule 60(b) is therefore merited.[3] Mr. Abuhouran principally relies on the Supreme Court's 2005 decisions in *Mayle v. Felix*, 125 S. Ct. 2562 (2005) and *Gonzalez v. Crosby*, 125 S. Ct. 2641 (2005).

In *Mayle*, the Court stated that the one-year time limitation on § 2255 petitions does not bar a petitioner from amending a § 2255 petition to expand upon a previously presented claim for relief. 125 S. Ct. at 2570 (interpreting the meaning of Federal Rule of Civil Procedure 15(c)(2) in the context of federal habeas proceedings and the one-year statute of limitations under 28 U.S.C. § 2244(d)). However, the Court held that an amendment is subject to the one-year time bar when it asserts a new ground for relief

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[3] Rule 60(b) states, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . ., misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

supported by facts that differ in both time and type from those set forth in the original pleading. *Id.* at 2571.[4]

In *Crosby*, the Supreme Court noted that a party to a civil action may reopen a judgment under Rule 60(b) upon showing a "reason justifying relief from the operation of the judgment." 125 S. Ct. at 2646, n.2. The Court observed, "a movant seeking relief under Rule 60(b)(6) [must] show 'extraordinary circumstances' justifying the reopening of a final judgment. Such circumstances will rarely occur in the habeas context." 125 S. Ct. at 2649 (citing *Ackermann v. United States*, 340 U.S. 193, 199 (1950); *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988)). The Court concluded that a Rule 60(b) motion could not be used to present a new legal claim for habeas relief or to seek reconsideration of the merits of a previously presented claim, as such filings would violate the requirement that successive habeas petitions be certified by the court of appeals. However, the Court found that a Rule 60(b) motion could be employed, under "extraordinary circumstances," to assert that the district court improperly failed to reach the merits of an earlier claim.

In *Crosby*, the petitioner argued that the district court had misapplied the statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d), to bar his claim. The Supreme Court concluded that a

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[4] The holding in *Mayle* comports with the Third Circuit's earlier decision in *United States v. Duffus*, 174 F.3d 333, 337-38 (3d Cir. 1999), holding that an amendment to a habeas petition does not "relate back" under Rule 15(c)(2) when it presents a claim which rests upon a theory or facts *not* raised in the original habeas petition.

filing regarding the appropriate statute of limitations could be entertained without violating AEDPA's prohibition against an uncertified successive habeas petition. Moreover, the Supreme Court agreed with the petitioner, finding that the district court's application of the time bar was improper. Nonetheless, the Court concluded that the circumstances were not extraordinary, and affirmed the district court's decision to deny relief under Rule 60(b).[5]

In the instant case, this court does not find "extraordinary circumstances" which would justify reopening the final judgment. This is principally because Mr. Abuhouran's claim is meritless. Indeed, Mr. Abuhouran's precise claim has already been adjudicated on the merits in the case of Aktham Abuhouran—Mr. Abuhouran's brother, co-conspirator, and co-defendant. In *United States v. Abuhouran*, No. Crim. A. 95-560-04, 2001 WL 880323 (E.D. Pa. June 7, 2001), this court considered and rejected the very same argument presented here: that is, this court rejected the contention that the allegation, at count twenty-seven of the grand jury indictment, that Aktham Abuhouran and Hitham Abuhouran, along with Adham Abouhouran, "knowingly conducted and did knowingly aid, abet, and cause" a money laundering transaction was legally inadequate

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[5] The Court made clear that it only sought to consider "the extent to which Rule 60(b) applies to habeas proceedings under 28 U.S.C. § 2254, which governs federal habeas relief for prisoners convicted in state court. Federal prisoners generally seek postconviction relief under § 2255, which contains its own provision governing second or successive applications. Although that portion of § 2255 is similar to, and refers to, the statutory subsection applicable to second or successive § 2254 petitions, it is not identical." *Crosby*, 125 S. Ct. at 2646. While consideration in *Crosby* was limited to § 2254, the instant case arises under § 2255. However, since the parties do not dispute the applicability of *Crosby*, its relevance is assumed.

because it did not properly allege that a transaction occurred. As stated in that opinion, "[t]he writing of a check alleged in Count 27 of Mr. Abuhouran's indictment is adequate to allege the requisite 'conduct[ing] or attempt[ing] to conduct such a financial transaction' of 18 U.S.C. § 1956(a)(1)(A)(I)."

Therefore, Mr. Abuhouran's motion for relief from judgment under Rule 60(b)(6) will be denied. In addition, Mr. Abuhouran's motion for appointment of counsel—filed in November 2005 pursuant to 18 U.S.C. §3006A(a)(2)(B) and in connection with his Rule 60(b) motion—will be dismissed as moot, in light of today's adjudication of Mr. Abuhouran's Rule 60(b) motion.

III.

In January 2006, Mr. Abuhouran filed a petition to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Mr. Abuhouran concedes that this motion constitutes a second or successive habeas petition. However, he maintains that he is entitled to pursue this uncertified successive petition because *United States v. Booker,* 543 U.S. 220 (2005), represents a change in sentencing law.

This contention is contrary to Third Circuit case law. *See In re Olopade*, 403 F.3d 159 (3d Cir. 2005) (holding that, at this time, a defendant may not file a successive § 2255 petition on the basis of *Booker*); *see also Lloyd v. United States*, 407 F.3d 608 (3d Cir. 2005) (holding that *Booker* is inapplicable to cases on collateral review).

More generally, this court lacks authority to grant petitioners with permission to file successive habeas petitions; pre-certification by the Court of Appeals is required. *See*

28 U.S.C. § 2244(b)(3)(A) (providing that before a second or successive habeas petition is filed in district court, the petitioner must apply to the court of appeals for an order authorizing the district court to consider the petition); *id.* § 2255(4) (adopting the requirements in § 2244 for second or successive § 2255 motions).

For these reasons, Mr. Abuhouran's January 2006 § 2255 petition will be denied.

IV.

In December 2005, Mr. Abuhouran filed a motion pursuant to Rule 38(b)(2) of the Federal Rules of Criminal Procedure requesting that this court recommend that he be confined near the place of the trial or appeal. The Government has not opposed this motion.

Rule 38(b)(2) provides: "If the defendant is not released pending appeal, the court may recommend to the Attorney General that the defendant be confined near the place of the trial or appeal for a period reasonably necessary to permit the defendant to assist in preparing the appeal."

At this time, Mr. Abuhouran does not have any appeal pending before the Third Circuit Court of Appeals,[6] and today's order will address all of the matters pending before this court.[7] In light of this, this court declines to exercise its discretion under Rule

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[6] In August 2005, the Third Circuit denied Mr. Abuhouran's application to file a second or successive motion pursuant to 28 U.S.C. § 2255.

[7] In November 2002, this court ruled on Mr. Abuhouran's original § 2255 petition and his requests to amend the petition. Today Mr. Abuhouran's January 2006 § 2255 is addressed, *see supra* Section III.

38(b)(2).

V.

Mr. Abuhouran's four pending motions will be denied or dismissed as moot in an order accompanying this memorandum.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA vs. HITHAM ABUHOURAN	CRIMINAL ACTION No. 95-560

ORDER

June 26, 2006

For the reasons stated in the accompanying memorandum, it is hereby ORDERED that:

1. Petitioner's *Pro Se* Motion for Relief of Judgment under Rule 60(b) (Docket #514) is DENIED.
2. Petitioner's *Pro Se* Motion for Appointment of Counsel under 18 U.S.C. § 3006A (Docket #515) is DISMISSED as MOOT.
3. Petitioner's *Pro Se* Motion Pursuant to Rule 38(b) (Docket #518) is DENIED.
4. Petitioner's *Pro Se* Motion to Vacate, Set Aside, Correct Sentence under 28 U.S.C. § 2255 (Docket #519) is DENIED.

FOR THE COURT:

/s/ Louis H. Pollak
Pollak, J.